No. 78-1496

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

LOCAL 13000, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioner,

v.

HARRIS A. PARSON, KAISER ALUMINUM & CHEMICAL CORPORATION,

Respondents.

RESPONDENT PARSON'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: May 3, 1979

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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Respondent Harris A. Parson, in his own behalf and on behalf of the class he represents, opposes the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause on July 10, 1978, rehearing and rehearing en banc denied, November 1, 1978.

STATEMENT OF THE CASE

1. Procedural History.

This suit was filed in September, 1967. The plaintiff alleged racial discrimination by Kaiser Aluminum & Chemical Corporation in the denial to him of a supervisory promotion at the Company's aluminum reduction plant in Chalmette, Louisiana. The case was brought as a class action, challenging a range of alleged discriminatory practices.[1] The union representing the maintenance and production employees at the plant was also named as a defendant.

Procedural motions and other pretrial procedures consumed over five years, and trial did not commence until February, 1973. Plaintiff presented evidence for eleven trial days and rested. The defendants moved under Rule 41(b) for voluntary dismissal on the ground that plaintiff had failed to prove a

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[1] The case was certified as a class action by the district court. See Pet., pp. 2a-3a.

prima facie case with respect to any of the allegations of discrimination. The district court took the motions under advisement and recessed the trial.

Fourteen months later, in May, 1974, the court granted the defendants' Rule 41(b) motions and dismissed the case. Plaintiff appealed and more than four years later, in July, 1978, the district court decision was reversed. Pet., 18a-48a; 575 F.2d 1374. The court of appeals held that a prima facie case had been established with respect to allegations of:

(1) discrimination against the named plaintiff in the denial of a promotion to a supervisory job;

(2) class-based discrimination in promotions to supervisory jobs;

(3) class-based discrimination in entry to craft jobs; and

(4) discrimination in transfer procedures.

With respect to each of these issues, the court of appeals remanded to the district court for consideration of the defendants' evidence and for a decision of the question of liability on a complete record. Rehearing and rehearing

en banc were denied on November 1, 1978.

On March 31, 1979, a petition for certiorari was filed in this Court by the union defendant, limited to the issue of the legality of the transfer procedures. The union did not seek a stay of the mandate of the court of appeals. See Rule 41(b), Federal Rules of Appellate Procedure. However, proceedings in the district court on remand have not gone forward. On November 28, 1978, the district court judge, who had conducted the trial and who had rendered the original decision, recused himself and reallotted the case to another judge, on the ground that the appellate decision had "impugn[ed his] integrity." [2]

On February 21, 1979, a status conference was held before the judge to whom the case had been reallotted. Over plaintiff counsels' objection to the delay, trial was set to resume on November 26, 1979. Plaintiff then filed a formal motion for an earlier trial date. See 42 U.S.C. §2000e-

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[2] The Memorandum Opinion explaining the recusal is reprinted infra at pp. 1a-3a.

5(f)(4), (5). That motion was argued and denied on April 4, 1979. At both the February status conference and the April argument, this petition for certiorari was offered by defense counsel as justification for delay in the resumption of trial.

2. The Transfer Procedure.

From the opening of the plant in 1951 until 1956, black employees at Kaiser's Chalmette Plant were restricted to positions as laborers and porters in certain departments.

The transfer procedure at the Chalmette Plant accords a priority for job vacancies to persons who are already in the department in which the vacancy occurs and have worked there for at least ten days. Accordingly, it is usually possible to transfer to another department only to the lowest paid job. This rule prevents the victims of Kaiser's past discrimination, now middle-aged men, from transferring directly to an attractive, more highly paid vacant job in another department, for which they are fully qualified and most senior. Instead, it requires these men, as a condition of

eligibility for such a job, to transfer to a job that pays less than their present job, and that, frequently, is beyond their current physical capacities, and then to wait for an indefinite period until the job they wanted comes open. The court of appeals held that this restriction on transfer perpetuates past discrimination, and violates Title VII, unless the defendants can show that it is justified by business necessity. See Pet., pp. 25a-27a, 40a-43a. In its decision denying rehearing, the court made clear its view that the transfer restrictions were not part of the "seniority system" within the meaning of Section 703(h). Pet., 49a-50a.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. Certiorari Should Not Be Granted Because of the Interlocutory Nature of the Decision Below.

This Court has consistently declined, absent some special justification, to grant review of a decision of a court of appeals remanding a case to a district court for further proceedings. See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R., 389 U.S. 327, 328 (1967)("because the Court of Appeals re-

manded the case, it is not ripe for review by the Court"); Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 257-58 (1916).

For several reasons, the usual presumption against review in this Court of interlocutory decisions is especially applicable in this case.

a. The Question Presented in the Petition May Have No Bearing on the Disposition of This Case in the District Court.

The court of appeals did not find that defendants' transfer procedure is unlawful. It merely held that plaintiff had established a prima facie case sufficient to require the defendants to come foward with their evidence. At this stage, it is uncertain whether the court of appeals' decision will have any effect on the final disposition of this case.

1. Contrary to the assertions in the Petition (pp. 4, 6, 8), neither plaintiff nor the court of appeals have ever acknowledged that the transfer system is "bona fide" within the meaning of Section 703(h). Because this case was

tried prior to the decision of this Court in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), the bona fides of the system were not addressed in the proceedings below. In light of Teamsters, it now is open to plaintiff on remand to prove that the system is not "bona fide," see James v. Stockham Valves and Fittings Co., 559 F.2d 310, 352-53 (5th Cir. 1977). If it is not "bona fide," no immunity is provided by Section 703(h), regardless of the scope of a "seniority system." See Teamsters, 431 U.S. at 355-56.

(ii) The court of appeals held that the system is not unlawful if it is a "business necessity." Pet., 43a. The defendants have not yet offered their proof on this issue. The Petition describes the transfer rule as a "practical imperative," p. 14, which is essentially the same as "business necessity." See Dothard v. Rawlinson, 433 U.S. 321, 331-32 & n.14 (1977); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 244 n.87 (5th Cir. 1974); United States v. Bethlehem Steel Corp., 466 F.2d 652, 662 (2d Cir. 1971). If the defendants sustain this defense, the system is lawful regardless of

the court of appeals' construction of Section 703(h).

(iii) Even if the transfer system were held to unlawfully perpetuate past discrimination, there may be no relief on this issue. The system itself would not have to be changed, except with respect to blacks as to whom the system perpetuates past discrimination. See Southbridge Plastics Division v. Local 759, 565 F.2d 913, 916 (5th Cir. 1978), and cases cited. These persons were hired twenty-three or more years ago. The most recent evidence in the record of this case is seven years old. As a result, there is no indication as to whether any victim of past assignment or transfer discrimination is still working at the plant, is working in a department to which he was originally discriminatorily assigned, or would now want to transfer to a department from which he was discriminatorily excluded. Moreover, it is unclear whether any such person could establish an entitlement to back pay under the standards announced in Teamsters, supra, 431 U.S. at 362-71. Indeed, the record does not even reflect whether the transfer procedures

under consideration were retained or modified in post-1972 agreements between the defendants.

In summary, the usual disinclination of this Court to grant review of a decision remanding a case to a district court for further proceedings is reinforced in this case by the real possibility that, when the case is concluded in the district court, its resolution will be unaffected by the issue presented here. If, on the other hand, the issue is fully considered in the district court and relief is granted based on the theory adopted by the court of appeals, petitioner may secure review on a complete record in the court of appeals, and, if necessary, can petition this Court for certiorari.

b. Review in this Court of the Interlocutory Order of the Court of Appeals Conflicts with the Express Statutory Requirement of Expedition of Suits Under Title VII.

Section 706(f)(4) and (5), of Title VII, 42 U.S.C. §2000e-5(f)(4) and (5) set forth a Congressional direction that suits under Title VII be expeditiously heard and

determined. [3] Unfortunately, in this case that mandate has not been honored. Plaintiff Parson was denied a promotion to foreman in 1966 when he was 46 years

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[3] These sections provide:

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

old. He is now 59. The court of appeals has held he is prima facie entitled to relief, but no relief or even a resumption of proceedings is in sight. The district court certified this as a class action, but many of the class members with claims of promotion or transfer discrimination have died or retired. Others have left the company for employment elsewhere. The age of this case, together with the voluntary recusal of the trial judge, mocks the concept of speedy justice and defies the mandate of the statute.

Review of the court of appeals' interlocutory order in this Court at this stage will unnecessarily further delay the ultimate disposition of this case. Although the mandate of the court of appeals has not been stayed, the petition for certiorari has already been cited by defense counsel and the district court as justification for a long delay before the resumption of trial. If certiorari is granted, further delay will undoubtedly result.

2. The Question Presented in the Petition Should Not Be Decided in this Court until it Has Received Further Consideration in the Lower Courts.

Petitioner has argued that any proce-

dure that "determines who gets or keeps an available job," is part of a "seniority system", within the meaning of Section 703(h). Pet., p. 12. But the issue is more complex. The union's formulation would include, as part of a "seniority system," test, education and other objective requirements relating to qualifications, and that is obviously not correct. The task is to draw a line between those selection procedures that are part of a seniority system, and those that are not. While some procedures, such as seniority, on the one hand, and test and education requirements, on the other, can be readily classified, there are many others, such as time-in-job (residence) requirements, prior experience requirements, lines of progression or other bidding eligibility requirements, as to which the proper classification is not clear. Bryant v. Brewers Ass'n, 585 F.2d 421 (9th Cir. 1978), illustrates the variety of contexts in which the issue will arise. There, the court of appeals held that a rule that defined permanent employees, for purposes of certain competitive preferences, as those who had worked 45 weeks in a single year was not part of the seniority system, within the meaning

of Section 703(h).

An effort by this Court to establish standards for the determination of which procedures are part of a "seniority system" and which are not should be made with the benefit of a body of lower court decisions addressing the issue in a variety of factual contexts, and particularly decisions in cases in which the issue is litigated in light of this Court's decision in Teamsters. To date the issue has been addressed in only a small handful of cases, all of which, like this case, were tried and appealed prior to the decision in Teamsters.[4]

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[4] The only cases addressing this issue, apart from this case, are: Patterson v. American Tobacco Co., 586 F.2d 300, 303, 305-06 (4th Cir. 1978)(line of progression); Alexander v. Aero Lodge No. 735, 565 F.2d 1364, 1376-77 (6th Cir. 1977) (recall rights); Bryant v. Brewers' Ass'n, 585 F.2d 421 (9th Cir. 1978)(service requirements). See also Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1193-200 (5th Cir. 1978)(line of progression).

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: May 3, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

HARRIS PARSON, ET AL

VERSUS

KAISER ALUMINUM & CHEMICAL CORP., ET AL.

CIVIL ACTION
NO. 67-1257
SECTION "E"

ORDER

After careful consideration I have decided to and I do hereby recuse myself in this action.

My brother who will be assigned this case and the lawyers and litigants are entitled to know my reasons.

In the eighteen years that I have been a trial judge I have been reversed on numerous occasions and while I, like most judges, do not enjoy the experience, it is usually done in such a manner that the trial judge's integrity is left intact, and he can proceed objectively with the case on remand, if that is necessary.

In this case, which I handled over a period of nine years, the opinions of the

panel simply stated that I had completely ignored the law and the evidence. Such a statement impugns my integrity.

I had almost come to accept the main opinion and mark it down to experience until the Per Curiam decision was handed down on the petitions for rehearing and rehearing en banc filed by the defendant Kaiser Aluminum & Chemical Corp. and a Local Union of the Steelworkers' Union. As though they were addressing a Judge with a long history of ignoring the rights of blacks and minorities under the law, which is not the case as my record will demonstrate, I was admonished that:

> "in the midst of jurisdictional change and complexity, the Court should not lose sight of its primary obligation, which is to ensure that the victims of illegal racial discrimination receive the full measure of relief to which the law entitles them."

I resent this gratuitous and improper preaching. I have never lost sight of this obligation. It may be that Kaiser Aluminum and the Steelworkers' Union might feel more reassured if the suggestion had included a reminder that our primary obligation is

also to dismiss suits brought against Corporations and Unions if they have no merit.

Obviously I can not be sure that I could give either side in this case a fair trial. If I follow the court's instructions, in my zeal to discover some merit in this case I could lean over backwards against the Corporation and Union, which would not be fair to them.

The caustic and inaccurate tone of the reversal simply makes it unlikely that I could be fair and impartial.

New Orleans, Louisiana, this 28th day of November, 1978.

/s/ Fred J. Cassibry
United States District Judge